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IN THE

Supreme Court of the United States

OCTOBER TERM 1974

No. 74-1345

U.S. MERCHANDISE MART, INC., *Petitioner,*

v.

D & H DISTRIBUTING COMPANY, *Respondent.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF RESPONDENT IN OPPOSITION

QUESTION PRESENTED

Whether the Court of Appeals correctly determined that the District Court was correct as a matter of law in granting respondent's motion for a directed verdict, in the absence of proof establishing a prima facie violation of Sections 2(a) or 2(e) of the Robinson-Patman Act amendments to the Clayton Act, 15 U.S.C. §§13(a), (e).

STATEMENT

A. Proceedings Below.

This case began on July 22, 1971, when petitioner U.S. Merchandise Mart (hereafter Merchandise Mart) instituted an antitrust suit in the United States District Court for the District of Columbia against respondent D & H Distributing Company (hereafter D & H) alleging, *inter alia,* that D & H's sales of RCA television sets were transacted in such a way as to discriminate unlawfully against petitioner both as to price and related promotional services.

On January 23, 1974, a trial before a jury was held with respect to the claims of alleged violations of Sections 2(a) and 2(e) of the Robinson-Patman Act amendments to the Clayton Act, 15 U.S.C. §§ 13(a), (e). On January 28, 1974, Judge Joseph C. Waddy directed a verdict in favor of respondent after concluding that petitioner had failed to establish a prima facie case under Section 4 of the Clayton Act, 15 U.S.C. § 15, for alleged violations of Sections 2(a) and 2(e) of the Robinson-Patman Act amendments to the Clayton Act (Pet. App. 1a-5a).

On January 28, 1975, the United States Court of Appeals for the District of Columbia Circuit affirmed, per curiam without opinion, the lower court's action in granting a directed verdict in favor of respondent.

B. Petitioner's Statement Is Devoid of Any Record Facts To Support the Contention of Discriminatory Treatment.

Petitioner is a retail dealer of appliances, including television sets, portable radios and stereos, and furniture, carpeting and bedding (Pretrial Order 1). Respondent is a distributor at wholesale of electrical

appliances, including television sets, portable radios and stereos manufactured by RCA Corporation (RCA) (Pretrial Order 2). During the period from January 1968 through mid-July 1968, Merchandise Mart purchased RCA products from D & H which amounted to approximately $28,000 in dollar volume (App. 81-83, 105).[1] In mid-July 1968, petitioner and respondent ceased doing business with each other (App. 81-82).

Simply stated, there is no record evidence that would establish the existence of any lower price or prices being charged by respondent to petitioner's competitors for a specific RCA product than were charged to petitioner for the same or a comparable product. At trial, petitioner presented no invoices reflecting the prices which Merchandise Mart or any of its competitors was actually charged for RCA products sold by respondent. Moreover, the record does not contain any comparative price data or information with respect to prices charged by respondent to petitioner and its competitors. Nor is there any evidence that respondent provided petitioner's competitors with a greater discount than the three percent discount made available to petitioner on the RCA products purchased by petitioner.

Mr. Cecil Koger, an appliance manager employed by petitioner, stated that he had no personal knowledge of competitors of petitioner purchasing RCA products from respondent at more favorable prices (App. 62-63). He could not recall any specific RCA product for which respondent contemporaneously charged peti-

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[1] References to the "App." are to the Appendix and Supplemental Appendix filed with the Court of Appeals for the District of Columbia Circuit.

tioner a higher price than was charged to petitioner's competitors (App. 65-66).

Mr. Norman Bennett, President of Merchandise Mart, testified that during the period from January through mid-July 1968, respondent provided petitioner with the following: (1) a three percent discount on the purchases of subject RCA products; (2) free delivery on these products; (3) extended credit with respect to its purchases of RCA products; (4) stocking allowances; and (5) credit for cooperative advertising allowances (App. 105-109). Further, Mr. Bennett and Mr. Koger admitted that Merchandise Mart purchased RCA products at reduced prices (App. 14-15, 108).

There was testimony from several of petitioner's employees that in May 1968 respondent advertised RCA color television sets in newspaper advertisements containing a telephone number to be called by prospective customers to determine the name of a local RCA dealer (App. 23-24). Petitioner's employees called D & H under the guise of being consumers (App. 15-17, 23-28, 31-33, 47-48). They gave the D & H employee an address which was in close proximity to petitioner as well as other retail dealers of RCA products (App. 16, 25, 32, 48). Petitioner's employees were not given the name of Merchandise Mart by the D & H employee. The record indicates that at no time were any customers or prospective customers of petitioner referred by D & H to a competitor (App. 110). There was no evidence in the record that petitioner had ever purchased any of the RCA television products which were the subject of the D & H advertisements (App. 15-17, 23-28, 31-33, 47-50).

ARGUMENT

A. The Petition Presents No Important Question of Federal Law, or Conflict Among the Circuits or Conflict with the Decisions of this Court.

The District Court and Court of Appeals have concluded that petitioner failed to establish a cause of action under the antitrust laws. Petitioner is now attempting to have this Court review, *de novo,* the evidence or the inferences to be drawn therefrom. This is totally at odds with this Court's recognized criteria for granting certiorari. See, *e.g., General Talking Pictures Corp.* v. *Western Electric Co.,* 304 U.S. 175, 178 (1938). There is no important federal question raised by the Petition. Nor does it involve any conflict among the circuits or with any decision of this Court. Review by this Court would be limited to the factual situation presented by the record. The petition should be denied since there is no substantive question under the Robinson-Patman Act amendments to the Clayton Act or any of the antitrust laws involved which has not already been decided by this Court.

B. Review by This Court of the Questions Presented by Petitioner Would Not Affect the Judgment in Favor of Respondent Since the Petitioner Has Not Challenged the Determination That It Had Failed To Establish Injury Under Section 4 of the Clayton Act.

The Petition raises two questions attacking the grant of a directed verdict in favor of respondent relating to the claims of price discrimination and promotional service discrimination. Petitioner does not challenge the District Court's determination of the absence of any evidence to establish injury or the fact of damage

under Section 4 of the Clayton Act (Pet. App. 3a).[2] Therefore, the question raised by petitioner would not alter the judgment below, since respondent would be entitled to a directed verdict based solely on the lower court's determination that petitioner had failed to present sufficient evidence of the fact of injury or damage under Section 4 of the Clayton Act.

C. Applying the Proper Standards, the Court of Appeals and District Court Concluded That Petitioner Had Failed To Establish a Cause of Action.

Relying on the well-established threshold requirement under Section 2(a) of the Robinson-Patman Act, the District Court concluded that petitioner failed to present any evidence of at least two sales transactions at different prices (Pet. App. 1a-2a). The District Court reached this conclusion after carefully assessing the testimony of the key witnesses presented by petitioner (Pet. App. 1a). Petitioner has not pointed to any specific evidence to contradict the lower court's assessment. Indeed, petitioner argues that the lower court's rationale—that two or more sales transactions at discriminatory prices must be shown—constitutes an artificial test (Pet. 5-6).

As denoted by this Court in *FTC* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 549 (1960), "discriminate in price"

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[2] Petitioner's claim of injury or damage was without factual foundation. Petitioner claimed damages of $300,000 based on purchases of approximately $28,000. Significantly, there was evidence negating the fact of injury over and above the absence of proof of price or related discrimination and the absence of proof of lost sales or lost profits (App. 55). In 1968, when Merchandise Mart ceased doing business with respondent, it increased its representation of General Electric products to take up the void left by RCA (App. 101).

under Section 2(a) means a price difference. In *FTC* v. *Morton Salt Co.*, 334 U.S. 37, 45 (1948), this Court observed that a "discrimination in price" under Section 2(a) of the Act required, at a minimum, proof "that a seller had charged one purchaser a higher price for like goods than he had charged one or more of the purchaser's competitors." Similarly, in *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U.S. 743, 756 (1947), this Court held that a single transaction could not violate the Act and that there must be proof that the same kinds of products "were sold to others at different prices within a relevant period of time, amounting to a discrimination...."

Viewing the evidence at trial in the light most favorable to petitioner and giving the petitioner the benefit of all reasonable inferences to be drawn from the evidence, both the District Court and Court of Appeals concluded that there was neither the quantum nor quality of evidence requisite to establish the elements of a violation of Section 2(a) of the Act. Totally absent from this record is any evidence that petitioner was charged one price for an RCA product and that a competitor was charged a lower price for a comparable product. In short, there is no factual basis to support an essential element of a Section 2(a) case—that petitioner Merchandise Mart was charged a higher price for an RCA product sold by respondent and that petitioner's competitors were charged a lower price by respondent for a comparable product.

Equally important, petitioner did not present any evidence that it had purchased RCA products of like grade and quality contemporaneously at prices higher than those charged to competitors by respondent. There

was no evidence that petitioner had purchased comparable RCA products—goods of like grade and quality—or testimony as to the time when the sales of the items which were the subject of alleged discrimination had been made to petitioner or its competitors. Again, petitioner points to no specific evidence which would tend to contradict the lower court's conclusion in this respect (Pet. App. 2a).

The lower court also concluded that there was no evidence of the likelihood of an adverse effect upon competition, which is a prerequisite in establishing a prima facie violation of Section 2(a) (Pet. App. 3a). Indeed, in the absence of any proof of different prices—a higher and lower price—being charged for like RCA products to petitioner and its competitors, there can be no basis for inferring the requisite adverse effect upon competition. See, *Admiral Corp.*, 67 F.T.C. 375, 424-425, 428 (1965).

Section 2(e) of the Robinson-Patman Act amendments to the Clayton Act prohibits a supplier from granting promotional services or facilities to a customer unless such assistance is made available to all competing customers on proportionally equal terms, 15 U.S.C. §13(e). In order to establish a Section 2(e) violation, the burden is upon the plaintiff to prove: (1) discrimination in the granting of promotional services or facilities; (2) in interstate commerce; (3) between competing customers; (4) with respect to contemporaneous transactions; and (5) relating to the sale of commodities of like grade and quality. *Atalanta Trading Corp.* v. *FTC*, 258 F.2d 365, 370 (2d Cir. 1958).

With respect to petitioner's claim that respondent failed to recommend petitioner when its employees responded to advertisements conducted by respondent D & H, there was no evidence that petitioner had purchased from respondent any of the RCA television products which were the subject of the advertisements, at a time contemporaneous with the advertisements, or indeed at any time. Nor was there any evidence that any customer or prospective customer of petitioner had been referred by respondent to a competitor. In addition, the referral of bogus customers to competitors in and of itself fails to demonstrate that any benefit had been conferred on competitors which had been denied to Merchandise Mart. See, *General Foods Corp.*, 52 F.T.C. 798, 828 (1956).

CONCLUSION

The Court of Appeals and District Court properly concluded that respondent was entitled to a directed verdict. Petitioner has raised no issue which would alter that determination. Therefore, the petition for certiorari should be denied.

Respectfully submitted,

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